

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

| In the Matter of:

OAH No. L 2006010316

MICHELLE H.,

vs.

REGIONAL CENTER OF ORANGE
COUNTY,

Service Agency.

DECISION

Gary Brozio, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter in Santa Ana, California, on April 21 and August 4, 2006.

Mary Kavli, Manager, Fair Hearings and Mediations, represented the Regional Center of Orange County (RCOC).

Michelle's father, who is her conservator, represented Michelle H. (Michelle) at the hearing. Michelle and her assistant, Dianna Mortensen, were briefly present at the hearing on April 21, 2006. Michelle's brother, Brian, attended most of the hearing on April 21, 2006.

The matter was submitted on August 4, 2006.

ISSUE

Did the increase in Michelle's In Home Supportive Services (IHSS) hours from 99.7 hours a month to 283 hours a month justify an RCOC decrease in Michelle's Personal Assistant Service (PAS) from 100 hours a month to 23 hours a month?

FACTUAL FINDINGS

Michelle's Status

1. Michelle was born on March 25, 1985. She is 21 years old. Michelle is eligible for regional center services as a result of a diagnosis of cerebral palsy and an unspecified level of mental retardation. Michelle's father is her conservator.

2. Michelle lives with her father in the family home in Huntington Beach. Throughout her life, Michelle's mother was her primary caretaker, but in 2004 her mother passed away from cancer. Her father now makes all decisions concerning Michelle's care and education. Michelle's father is 60 years old, retired, and has an occupational disability involving a compressed disc in his lower back. He has also had three knee surgeries and a hernia operation. Nevertheless, Michelle's father provides her with care, including protective supervision.

3. Michelle is primarily non-verbal, and uses signs, gestures, and pointing to communicate. She can walk, but has difficulty with balance and coordination. She needs constant supervision to prevent her from falling. Michelle needs considerable assistance with personal hygiene, toileting, grooming, dressing, and eating. She does not, however, have severe behavioral challenges.

Michelle's Individual Program Plan

4. Michelle's most-recent Individual Program Plan (IPP) was prepared in March 2005. Shortly before then, Michelle's mother passed away. As relevant here, Michelle's IPP stated that Michelle would receive "24-hour care and supervision," that her family would "provide her with care and support," and that SSI would "fund Michelle's living expenses."

5. To accomplish these goals, Social Security Income funded Michelle's living expenses, and her health care and educational needs were met by other agencies. Michelle's personal care needs were met through IHSS (99.7 hours a month) and PAS hours (100 hours a month). RCOC provided 24 hours of respite (PRV) a month.

6. PAS hours involve basic care such as dressing, toileting, grooming, and eating. Michelle's Service Coordinator explained that it was unusual for a regional center client to receive PAS hours after reaching adulthood, and that PAS hours were not usually provided after a client received IHSS hours. RCOC initially afforded Michelle those hours because she was under 18 years old, her mother was fighting cancer, and her father was working an unpredictable schedule that kept him away from home. The IPP stated, "[t]he personal assistance hours for Michelle were initially authorized due to [her mother's] difficulty in providing Michelle with ongoing care due to her own health issues at the time and need for consistent medical treatment." But the IPP did not say when PAS hours would terminate, or what the effect would be of an increase in Michelle's IHSS hours.

The Increase in IHSS Hours and RCOC's Proposed Reduction of PAS Hours

7. In late 2004, RCOC asked IHSS to reevaluate Michelle's monthly hours because her global-care needs exceeded the amounts of services being provided. Especially significant was the fact that Michelle required constant supervision while walking. On April 1, 2005, IHSS increased Michelle's funding from 99.7 hours to the maximum rate of 283 hours a month.

8. On August 3, 2005, Michelle's father and RCOC staff met regarding Michelle's personal assistance services. RCOC wanted to reduce Michelle's PAS hours because of the significant increase in IHSS hours. Michelle's father wanted to keep the PAS hours in place, and he explained his reasons why.

9. On August 15, 2005, RCOC wrote a letter notifying Michelle that it planned to reduce the PAS hours from 100 to 23 hours a month. Based on information provided by Michelle's father at the planning team meeting, RCOC's letter detailed the reasons it believed that Michelle no longer needed 100 hours. During the weekdays, RCOC calculated that Michelle did not need supervision for 15 hours a day because she was in school, was being transported to and from school, or was asleep. That left 9 hours of the day uncovered. On weekends, RCOC calculated that Michelle did not need supervision for 7.5 hours a day because she was asleep. That left 16.5 hours of the day uncovered. RCOC estimated that, in a typical 30-day month, 22 days were workdays and 8 days were weekends. That meant that 198 hours were uncovered during the week and 132 hours were uncovered during the month, for a total of 330 uncovered hours a month. From this, RCOC subtracted the 283 hours of IHSS and the 24 hours of PRV, which left 23 hours uncovered. RCOC proposed to provide 23 hours of PAS to cover those 23 hours, which resulted in a reduction of 77 PAS hours a month.¹ The reduction was justified to avoid duplication of services.

The Fair Hearing and Related Matters

10. On December 9, 2005, Michelle's father requested a fair hearing because he wanted to retain 100 PAS hours a month.

11. On April 26, 2006, the hearing in this case began but was not completed. About two hours of testimony was heard and exhibits were received from both parties. Later, the remainder of the hearing was scheduled for August 4, 2006.

¹ Financially speaking, there were two ways to view this reduction. The first way concerned the differing rates between IHSS and PAS. IHSS paid \$8.40 per hour, while PAS services were \$12.00 per hour. This was a \$3.40 decrease in hourly rate, which would affect the amount of money Michelle had available to purchase services. The second way was to compare the total income Michelle received before and after the increase in IHSS hours. Before receiving the increase in IHSS, the total contribution to Michelle's care was \$2,243.16 per month (99.7 hours of IHSS + 100 hours of PAS + 24 hours of PRV = \$2,243.16.) Under the RCOC's proposed reduction in PAS time, the RCOC and county's combined contribution to Michelle's care would be \$2,858.88 (283 hours of IHSS + 23 hours of PAS + 24 hours of PRV = \$2,858.88). The combined sum of \$2,858.88 was over \$600.00 a month more than Michelle was receiving before the IHSS benefits increased to 283 hours a month.

On April 28, 2006, the ALJ issued an Order asking the parties to confirm certain calculations related to the changes in Michelle's IHSS, PRV, and PAS services.

On July 7, 2006, Michelle's father sent a letter asking whether audiotapes from the hearing on April 26, 2006, were available. In light of this inquiry, the ALJ reviewed the audiotapes and discovered that they were blank.

On July 14, 2006, the ALJ conducted telephonic conference with the Michelle's father and Mary Kavli. They agreed that, at the hearing set for August 4, 2006, the testimony would be presented anew, the existing exhibits would remain in the record, and new exhibits could be presented. The ALJ issued an Order to that effect.

On August 4, 2006, the parties presented their testimony and the matter was submitted.

Evaluation

12. Much of the dispute has become moot through the passage of time. While the hearing was pending, RCOC continued providing Michelle with 100 hours of PAS. RCOC did not seek reimbursement for any past expenditures. This meant that the period of time - from the planning team meeting on August 15, 2005, to the present - was not in dispute. Moreover, given the time it will take for this decision to become final, RCOC will be required to fund 100 hours of PAS for August 2006. Accordingly, the only issue that needs to be decided is how much PAS should be funded over the coming school year - Michelle's final school year - which runs from September 2006 through June 2007.

Michelle's father presented two reasons why the PAS hours should be greater than 23 hours a month for the coming school year. The first argument involved the calculation of school days; the second argument involved coverage for protective supervision.

(1) Calculation of School Days

13. Michelle's father argued that Michelle would not actually spend 22 days a month in school. He presented a copy of Michelle's 2005-2006 school calendar, which showed that, *on average*, Michelle spent less than 22 days in school every month. Thus, the weekdays that Michelle was not in school should have been treated like weekends for calculating protective coverage. Michelle's father apparently did not provide RCOC with Michelle's school calendar at the planning team meeting.

14. At the hearing, Ninh testified that RCOC's intent - as expressed in the August 15, 2005, letter - was to provide coverage for Michelle during her waking hours, but not when she was asleep, at school, or in transit to and from school. This level of coverage was believed necessary because Michelle's father was a single parent with a disability. This amounted to 9 hours of coverage on weekdays (when Michelle was in school) and 16.5 hours

of coverage on weekends (when Michelle was not in school). Ninh admitted that, based on the school calendar, Michelle was in school less than 22 days a month. For example, she was off for two weeks around Christmas, for a week during Spring break, and for other school holidays. Had Ninh known this, she would have changed her calculations to cover the non-school days like weekends.

15. RCOC made three arguments in support of its position that no more than 23 hours of PAS were necessary. RCOC argued that IHSS hours were generally intended to provide total coverage for personal assistance; that Michelle was receiving the maximum allowable hours of IHSS and should not require additional PAS hours; and that the parent was expected to fill gaps in coverage as a natural support. These arguments were not supported by the March 2005 IPP. The IPP did not provide for what would happen to Michelle's PAS hours if the IHSS hours were increased. The IPP merely stated that Michelle would receive "24-hour care and supervision," and that her family would "provide her with care and support." Those phrases were vague, and they provided little guidance on what might or should happen if Michelle's IHSS hours were significantly increased.

16. The question of Michelle's needs was better addressed in the letter following the planning team meeting, which was dated August 15, 2005, and in Ninh's testimony. The letter and Ninh's testimony recognized that Michelle needed personal assistance during her waking hours, i.e. when she was not asleep, in school, or in transit to and from school. The letter also provided for 23 hours of PAS, thus recognizing that the allocation of some PAS hours were necessary to meet Michelle's needs. Further, Ninh testified that she would have changed her calculations set forth in the letter of August 15 if she had known that, on average, Michelle spent less than 22 days a month in school. Thus, it is evident that Michelle requires more than 23 hours of PAS for the upcoming school year and that there is a need for recalculation.

17. Michelle's father did not provide the calendar for Michelle's 2006-2007 school year. Therefore, it was not possible to calculate the actual number of days Michelle would be in school for the 2006-2007 school year. Michelle's father testified, however, that the school days were about the same for the upcoming year. Using the 2005-2006 calendar, the average number of school days from October through May was about 19 days a month, rather than 22 days a month.² Using this as a metric is fair and reasonable in resolving the dispute between the parties. It meets Michelle's needs for the upcoming school year. It is consistent with Michelle's IPP, the RCOC's letter of August 15, 2005, and Ninh's testimony. It avoids duplication of services, and requires Michelle's father to provide reasonable amounts of natural support. It balances Michelle's needs and preference against RCOC's obligation to provide cost-effective services.³

² This calculation excluded Thanksgiving Day, Christmas Day, New Years Day, and Easter. Natural support is expected on these holidays. This calculation did not include the days in June after school ends, as the parties will have to revisit the issue of coverage when Michelle finishes school.

³ This decision expresses no opinion about what coverage Michelle would be entitled to after finishing school. That is a matter for the parties to resolve in the next IPP.

18. Under this calculation, an average school month has 19 school days and 11 non-school days. This means that 171 hours will be uncovered during school days ($19 \times 9 = 171$) and 182 hours will be uncovered on non-school days ($11 \times 16.5 = 181.5$), for a total of 353 hours a month. Subtracted from this number are the 283 hours of IHSS and the 24 hours of PRV, which leaves 46 hours uncovered (rather than 23). Thus, Michelle's PAS hours, from September 2006 through May 2007, should be in the amount of 46 hours a month.

(2) Protective Supervision

19. Michelle's father argued that he should receive PAS hours for providing Michelle with protective supervision while she slept. He argued he cannot leave the house at night, that IHSS permitted him to bill for this service at night, and that he had little obligation to provide Michelle with natural support because she was an adult. Thus, he argued, the 100 hours of PAS should remain in place. On the other hand, he admitted that Michelle wanted to live in the family home, and that he wanted her to live there.

20. RCOC argued that there was no justification for awarding PAS hours while Michelle slept because Michelle had no behavioral problems. She did not destroy things or run away. She typically got up once at night to go to the bathroom, and there is a bell on her door to notify her father that she needs assistance. Michelle was provided one-half hour a day of PAS to cover the nighttime assistance. She did not require personal assistance for the entire night.

21. RCOC's position on this issue was persuasive. Michelle's father conceded that she does not destroy property or run away at night. Under these circumstances, it would be unreasonable for RCOC to provide PAS hours to supervise Michelle during the periods she sleeps. It would result in a duplication of services and would constitute a payment for a natural support. Michelle wants to live at home and her father wants her there. These preferences require her father to assume a portion of her care as a natural support.

CONCLUSIONS OF LAW

1. The Lanterman Developmental Disabilities Services Act (Act) is contained in the Welfare and Institutions Code. (Welf. & Inst. Code, § 4500 et. seq.)⁴ The purpose of the Act is to provide a "pattern of facilities and services . . . sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life." (§ 4501; *Association of Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.) Such services include assessing the needs of each developmentally disabled person, and on an individual basis, selecting and providing services to meet those needs. (§§ 4642-4643; 4646-4647; *Association of Retarded Citizens, supra*, 38 Cal.3d at 388.)

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All further references are to the Welfare and Institutions Code unless otherwise specified.

2. A developmentally disabled person has the right to treatment at state expense. (*Association of Retarded Citizens, supra*, 38 Cal.3d at 389.) The regional center is charged with providing developmentally disabled persons with “access to the facilities and services best suited to them throughout their lifetime.” (§ 4620; *Association of Retarded Citizens, supra*, 38 Cal.3d at 389.) The developmentally disabled person’s IPP identifies the necessary services and must include, among other things, a statement of time-limited objectives for improving the situation and a schedule of the type and amount of services necessary to achieve the IPP’s objectives. (§ 4646; *Association of Retarded Citizens, supra*, 38 Cal.3d at 390.)

3. When providing services, the IPP must serve competing objectives. On the one hand, the IPP must, where appropriate, ensure that the services to consumers and their families be effective in meeting the IPP’s goals and reflect the preferences and choices of the consumer. On the other hand, the IPP must reflect the cost-effective use of public resources. (§§ 4512, subd. (b); 4646.)

4. The Lanterman Act mandates that regional centers be cost effective. (§ 4640.7, subd. (b).) It also prohibits regional centers from supplanting the budget of other agencies that have an obligation to provide services. (§§ 4644, sub. (a); 4648, sub. (a)(8); 4659, sub. (a)(1).)

5. RCOC has demonstrated that, for Michelle’s upcoming school year, it is not necessary to provide PAS services while Michelle sleeps, is in school, or is in transit to and from school. This conclusion is based on Factual Findings 1 through 9 and 12 through 18 as well as Legal Conclusions 1 through 4.

6. Claimant has demonstrated that, for the upcoming school year, Michelle needs 46 hours of PAS a month. This conclusion is based on Factual Findings 1 through 9 and 19 through 21 as well as Legal Conclusions 1 through 4.

ORDER

RCOC is ordered to provide Michelle with 100 hours of PAS through August 2006. RCOC is ordered to provide Michelle with 46 hours a month of PAS from September 2006 through May 2006. All other claims for relief are denied.

DATED: _____

GARY BROZIO
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.